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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 710

R. C. GLOVER, M. C. FINDLEY AND TINKHAM GILBERT, TRUSTEES UNDER THE WILL OF SARAH E. CARRIER, DECEASED, PETITIONERS

v.

J. W. MALONEY, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF OREGON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 18–24) are not reported. The opinion of the Court of Appeals (R. 72–76) is reported at 171 F. 2d 870.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1949 (R. 77). The peti-

tion for a writ of certiorari was filed on April 9, 1949. The jurisdiction of this Court rests upon 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether 15/20ths of the income received by the administratrices in the taxable years 1940 to 1942, inclusive, during the course of the administration of the estate of Sarah E. Carrier, deceased, was income which was permanently set aside during the taxable years for charitable, etc., purposes pursuant to the last will and testament of the decedent and was thus deductible for income tax purposes under Section 162 (a) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 161. IMPOSITION OF TAX.
>
> (a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—* * *
>
> (b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, * * *
>
> (26 U. S. C. 1946 ed., Sec. 161.)
>
> SEC. 162. NET INCOME.
>
> The net income of the estate or trust shall be computed in the same manner and

on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for * * *;

* * * * *

(26 U. S. C. 1946 ed., Sec. 162.)

STATEMENT

The findings of fact of the District Court (R. 19–22), taken to a large extent from admitted facts (R. 10–12), are as follows:

Sarah E. Carrier, hereinafter called the "decedent", died on January 27, 1940 (R. 19). In her last will and testament, she provided for certain specific bequests and, in paragraph Fourteenth, devised and bequeathed the residue of her estate to designated charitable, religious and educational organizations as follows (R. 19–20): 5/20ths directly to designated charitable, religious and educational organizations and the remaining 15/20ths to petitioners herein as trustees upon the following terms (R. 20):

> * * * to be held by them in trust for ten years after my decease, and safely invested by them and the income derived therefrom to be devoted to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees, it being my direction that the corpus of said trust fund be kept intact and such interest and income derived therefrom as is not used for the purposes above indicated to be added thereto and upon the expiration of said trust period of ten years after my decease said trustees divide all of the funds in their possession as such trustees, including the corpus of said trust fund and accumulated interest and income derived therefrom and not otherwise disposed of under the authority herein conferred, into four parts, of equal value, and execute such instruments as may be required by the laws of Oregon to transfer the same in equal portions to the following institutions [naming them].

The organizations named in the above-quoted paragraph are charitable and religious organizations within the purview of Sections 23 (o) and 162 (a) of the Internal Revenue Code (R. 12, 22).

The estate of the decedent remained in the process of administration until March 30, 1943,

during which time no payments were made to relatives under paragraph Fourteenth of the decedent's will (R. 21). On March 30, 1943, the administratrices transferred 15/20ths of the residue of the estate to petitioners as trustees, in accordance with the provisions of paragraph Fourteenth of the will (R. 11, 21).

During the period when the estate was in the process of administration, the administratrices filed income tax returns for the estate, reporting and paying tax on net income of $25,356.42 for the period from January 27, 1940, through December 31, 1940; $21,784.04 for the calendar year 1941; and $24,592.67 for the calendar year 1942 (R. 21). None of this income was from the sale of capital assets (R. 11).

The gross income, expenses and amounts paid to indigent relatives since the establishment of the trust on March 30, 1943, after the taxable periods involved here, were as follows (R. 22):

Period	Gross income [1]	Expenses	Payments
3/31/43 to 12/31/43	$21,536.02	$2,100.00	$675.00
1944	26,147.74	2,540.63	1,800.00
1945	23,101.16	1,438.86	1,800.00
1946	22,667.09	694.63	1,800.00
Total	93,452.01	6,744.12	6,075.00

[1] Includes the 5/20ths interest of the charitable organizations which received their shares directly. Their shares have been administered by the same trustees pursuant to an agreement between such organizations and the trustees to effect an orderly liquidation and disposition of the assets of the estate.

The Collector voluntarily refunded the tax paid on 5/20ths of the income received by the admin-

istratrices during the years 1940 to 1942, inclusive, and claims for refund of the remaining 15/20ths of the tax for each year were subsequently filed by petitioners. The claims for refund were disallowed. (R. 22.) Petitioners subsequently filed this suit for refund in the District Court.

The District Court held that the tax had been illegally collected, and that petitioners are entitled to refund of the tax (R. 23). The Court of Appeals for the Ninth Circuit reversed (R. 72–76).

ARGUMENT

As grounds for the issuance of a writ of certiorari, petitioners assert that the decision below is in conflict with the decision of this Court in *Ithaca Trust Co.* v. *United States,* 279 U. S. 151 (Pet. 7, 17), and with the decision of the Court of Appeals for the Sixth Circuit in *Commissioner* v. *Upjohn's Estate,* 124 F. 2d 73 (Pet. 7, 14–16). In their brief in support of the petition, petitioners further assert that the court below apparently misconstrued decisions of the Supreme Court of Oregon in interpreting the decedent's will. (Pet. 11.) None of these assertions is correct, we submit.

1. The case turns primarily upon an application of the pertinent law of the State of Oregon. The rule in Oregon, as in other jurisdictions,[1]

[1] See, e. g., *Hale* v. *Anglim*, 140 F. 2d 235 (C. A. 9th); *Commissioner* v. *Bishop Trust Co.*, 136 F. 2d 390, 391 (C. A. 9th); *Harrison* v. *Commissioner*, 119 F. 2d 963 (C. A. 7th); 1 Restatement, *Trusts*, Sec. 234.

is that, when property is devised in trust to pay the income therefrom to a beneficiary, the income accrues to the beneficiary as of the date of the testator's death, rather than from the date of the delivery of the estate to the trustee, unless otherwise provided in the will. *Kinney* v. *Uglow,* 163 Or. 539, 552–555; *In re Feehely's Estate,* 179 Or. 250, 256. The rule also applies when the testamentary trust consists of the testator's residuary estate (*Kinney* v. *Uglow, supra*; see also 70 A. L. R. 637–644, note; and 158 A. L. R. 443–447, note) and when the trustee is given a discretion in respect of payment of the income to the beneficiary (see *In re Feehely's Estate, supra*; and *Hewitt* v. *Hicock,* 96 Conn. 176, cited in *Kinney* v. *Uglow, supra,* as authority for the rule). The trustee thus should not add to the trust corpus the income received by the executor. 4 Bogert, *Trusts and Trustees,* Sec. 811. The rule applies, however, only to income from the trust corpus as subsequently ascertained, that is, from the residue constituting the trust corpus after payment of administration costs, debts, and legacies. *In re Feehely's Estate, supra*; *Commissioner* v. *Bishop Trust Co., supra*; 158 A. L. R. 443, note.[2] That qualification does not affect the present case,

[2] *In re Feehely's Estate, supra,* in which the rule was reiterated, as well as *Proctor* v. *American Security & Trust Co.,* 98 F. 2d 599 (C. A. D. C.), from which petitioners quote (Pet. 12–13), involved the rule as to income from property sold to pay administration costs, debts, or legacies, not income from property which was later turned over to the trustee.

since, according to the evidence (R. 51), the income involved here was all from property which was later transferred to the trustees as trust corpus.

The court below correctly applied the rule to the facts of this case. In her will, the decedent set up a trust "for ten years after my decease" under which the corpus was dedicated to charities, to remain intact, and the income was to be devoted to the care and maintenance of such blood relatives of the decedent and of her deceased husband, not farther removed than first cousins, who in the judgment of the trustees should be in need of financial assistance. (R. 20.) At the expiration of "said trust period of ten years after my decease", the corpus and accumulated income and interest were to be divided into four equal parts and each part transferred to a different designated charitable institution. (R. 20.) The will contained no provision indicating that the income received during administration of the estate was not to be available for payments to needy relatives. On the contrary, it was the income for a 10-year period which was to be so available and that 10-year period, according to the will, was the ten years after the decedent's death, which necessarily included the period of administration of the estate. Hence, under the rule applicable in Oregon, the income received during the administration of the estate remained income, instead of becoming trust corpus dedi-

cated to the charities, when it was turned over to the trustees after the taxable years. It could then, if not before by court order,[3] be used for payments to needy relatives, as well as for trust expenses.[4] Moreover, the income was available for payments to needy relatives in the succeeding years until the expiration of the trust period, the court below having been amply justified in stating (R. 75–76) that a study of the will as a whole indicates such a testamentary intent, with the unused income to be added to corpus only at the expiration of the 10-year period.

The result tax-wise follows as a matter of course. Since the income received in the taxable years, during the course of administration, was still available for payments to needy relatives after the taxable years, the income was not, pursuant to the decedent's will, permanently set aside during the taxable years for charitable purposes within the meaning of Section 162 (a) of the Internal Revenue Code, *supra*, p. 3. *Merchants Bank* v. *Commissioner*, 320 U. S. 256, 263; cf. *Henslee* v. *Union Planters Bank*, 335 U. S. 595; *Langenbach's Estate* v. *Commissioner*, 134 F. 2d 590 (C. A. 6th); *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner*, 126 F. 2d 48 (C. A. 9th); *Commissioner* v. *Upjohn's Estate*, 124 F. 2d 73

[3] See *Kinney* v. *Uglow*, *supra*; and *Reid* v. *Dodge*, 44 App. D. C. 558.

[4] Since the corpus was to be kept intact (R. 20), trust expenses were necessarily payable only from income.

(C. A. 6th); *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788 (C. A. 10th); *Boston Safe Deposit & T. Co.* v. *Commissioner*, 66 F. 2d 179 (C. A. 1st), certiorari denied, 290 U. S. 700; *Charles P. Moorman Home for Women* v. *United States*, 42 F. 2d 257 (W. D. Ky.); *Holcombe* v. *United States*, 41 F. Supp. 471 (D. Mass.); and *Colt* v. *Duggan*, 25 F. Supp. 268 (S. D. N. Y.).

2. The decision below is not in conflict with this Court's decision in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. That case involved a residuary gift to charity of principal which was subject during the lifetime of the decedent's wife to a power of invasion the non-exercise of which was susceptible of reliable prediction by objective standards. It was there held that the charitable gift, being ascertainable in amount, was deductible for estate tax purposes. The present case involves a claimed deduction for income tax purposes of an alleged charitable bequest of income, and the decedent's will, as interpreted in accordance with the law of Oregon, required that the income all remain available for noncharitable uses during and after the taxable years. While unused income is to be added to corpus at the end of the 10-year trust period and then transferred to named charities, Section 162 (a) of the Code, under which the deduction is claimed, permits a deduction only for income which is permanently set aside for charitable purposes during the taxable years. Unlike the *Ithaca Trust Co.* case, no

objective standard was provided for determining the amount that would ultimately go to the charities.[5] The amount was not ascertainable during the taxable years and, thus, no part of the income of the taxable years could, pursuant to the decedent's will, be permanently set aside during those years for charitable purposes.

3. The decision below is not in conflict with *Commissioner* v. *Upjohn's Estate*, 124 F. 2d 73 (C. A. 6th). In that case, on facts different from those of the present case, a deduction was allowed for income alleged to have been permanently set aside during the taxable years, pursuant to the decedent's will, for a charitable purpose. The decision states as propositions of law (1) that the deduction is not allowable if there is a reasonable possibility that the charitable bequest may be invaded for a noncharitable purpose so that the amount ultimately available for charitable purposes is not ascertainable and (2) that a possibility of invasion which is so remote as not to exist as a practical matter does not preclude definite ascertainment of the amount of the charitable bequest. This is not exactly a correct statement of the applicable law[6] but, for present

[5] The standard for making payments to relatives, financial need, was definite enough but, as one of the trustee-petitioners testified (R. 65), the trustees had no way of knowing what the relatives might need in the future.

[6] The decision in *Commissioner* v. *Upjohn's Estate*, *supra*, as well as that in *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788 (C. A. 10th), also cited by petitioners (Br. 16–17),

purposes, it is sufficient that the decision recognizes that a deduction is not allowable if there is a reasonable possibility that the charitable bequest may be used for noncharitable purposes so that the amount ultimately available for charitable purposes is not ascertainable during the taxable years. The decision below was based on the primary availability of the income of the taxable years for noncharitable purposes and on the fact that the amount which would be used for noncharitable purposes was and still remains a matter purely of speculation. (R. 76.) Hence, the holding that the claimed deduction is not allowable under Section 162 (a) of the Code is consistent with the decision in the *Upjohn's Estate* case, the difference in result in the two cases being attributable to different facts.

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antedated this Court's decision in *Merchants Bank* v. *Commissioner*, 320 U. S. 256. Both decisions were relied upon by the Court of Appeals for the Sixth Circuit in its decision in *Union Planters Nat. Bank* v. *Henslee*, 166 F. 2d 993, which was reversed by this Court, 335 U. S. 595. It seems apparent from this Court's decisions in the *Merchants Bank* and *Union Planters Bank* cases that, in the case of a charitable bequest subject to invasion for noncharitable purposes, the remoteness of the possibility of invasion does not alone permit the deduction—that, to warrant a deduction, the amount of the charitable bequest must be definitely ascertainable by reason of the fact that the exercise of the power of invasion is limited by an objective standard fixed in fact and capable of being stated in definite terms of money, as in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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